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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.[1]

Citations to Opinions Below.

The opinion of the Circuit Court of Appeals, a copy of which is attached as Appendix A to the Petition for Writ of Certiorari, at 1, is reported in 458 F.2d 1217 (9th Cir. 1972). A copy of the order of the Circuit Court of Appeals denying petitioners' petition for re-

[1]The petitioners in addition to David Moor are William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle. The respondents in addition to the County of Alameda are Frank I. Madigan, Glenn Dyer, Thomas L. Houchens, Louis Santucci and Lawrence L. Riche. David Moor and the Rundles each filed a separate case in the district court against the above named respondents. Because the issues raised on appeal to the court below in each case are identical, except that the *Moor* case involves the additional issue of diversity jurisdiction, the court below ordered the appeals consolidated. (Appendix C to the Petition for Writ of Certiorari, at 14.)

hearing and for rehearing in banc is attached as Appendix B to the Petition for Writ of Certiorari, at 13. A copy of the order of the Circuit Court of Appeals consolidating the above captioned matters and granting petitioners' motion for an expedited hearing is attached as Appendix C to the Petition for Writ of Certiorari, at 14. Copies of the orders of the District Court, or portions thereof, which relate to the issues involved herein are attached as Appendices D, E and F to the Petition for Writ of Certiorari, at 15, 18 and 21 respectively, and the order attached as Appendix F is reported in 331 F. Supp. 492 (N.D. Cal. 1971). Portions of companion cases relating to the issues involved herein are attached as Appendices G and H to the Petition for Writ of Certiorari, at 31 and 32 respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 12, 1972. A timely petition for rehearing was filed on April 24, 1972 and denied on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether, if state law imposes vicarious liability upon its public entities for violations of the Civil Rights Acts (42 U.S.C. §§1981 *et seq.*) committed by the entities' employees, a federal court can use 42 U.S.C. §1988 to adopt that state law and, thereby, obtain jurisdiction under 28 U.S.C. §§1343(3) and (4) to impose that state-created liability.

2. Whether a federal court has the power to exercise jurisdiction over a party on a pendent state law

claim when such party is not involved in the related federal claim.

3. Whether Alameda County is a "citizen" of California for diversity jurisdiction purposes.

Statutes Involved.

28 U.S.C. §§1343(3) and (4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed

by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Statement of the Case.

The jurisdiction of the district court was invoked in each of these cases pursuant to 28 U.S.C. §§1343(3) and (4) because of questions arising under acts of Congress providing for the protection of civil rights (28 U.S.C. §§1981, 1983, 1985, 1986 and 1988). In the *Moor* case jurisdiction was also invoked pursuant to 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendants citizens of California. Pendent state law claims against each of the defendants were also joined in each of the cases.

Plaintiffs in both cases seek damages from the defendants Frank I. Madgan (hereinafter "Madigan"), Thomas L. Houchens (hereinafter "Houchens"), Glenn E. Dyer (hereinafter "Dyer"), Louis Santucci (hereinafter "Santucci"), Lawrence L. Riche (hereinafter "Riche") and the County of Alameda (hereinafter "County") for alleged Civil Rights Acts and state law violations committed by the named individual defendants in connection with their involvement in the People's Park disturbances in Berkeley, California on May 15, 1969.

Suit, in each case, was filed on February 12, 1970 (A. 5 and A. 22, respectively) and alleges that the

defendant Riche shot both the plaintiff David Moor and the plaintiff William Donovan Rundle, Jr. at approximately the same time and place without cause or provocation, and that the defendants Madigan, Houchens, Dyer and Santucci failed properly to discharge their duties and responsibilities as officers and commanders in connection with the defendant Riche's activities and the People's Park disturbance thus allowing those shootings to occur. The defendant County is alleged to have vicarious liability under California law for those acts and omissions of the individually named defendants. Plaintiffs also alleged that the County consented under California law to be sued. (A. 5 and A. 22-23, respectively).

On March 9, 1970 each of the defendants, including the County, filed an answer denying liability, (A. 11 and A. 28 respectively), but admitting that the County had so consented to be sued. (A. 11-12 and A. 28-29, respectively).

Thereafter, on August 18, 1970, the County, after first engaging in preliminary discovery motions in both cases, filed a motion to dismiss in the *Rundle* case for lack of jurisdiction over it. (A. 1).

On September 14, 1970, the County, filed a motion to dismiss in the *Moor* case for lack of jurisdiction over it as to the Civil Rights Acts claims only (A. 2).

These motions to dismiss were both heard on January 21, 1971. On March 31, 1971, the court issued an order granting the County's motion to dismiss in the *Rundle* case, postponing a ruling in the *Moor* case and requesting further points and authorities on the diversity jurisdiction aspect of that case (Appendix D to the Petition for Writ of Certiorari, at 15). The

County filed those points and authorities on April 9, 1971 and therein requested, for the first time, that the district court dismiss it from the state law claims on the ground that it was not a "citizen" of California for diversity jurisdiction purposes (A. 2). This point was then further briefed by both parties (A. 2).

On April 23, 1971, the plaintiffs in the *Rundle* case filed a motion for reconsideration of the order dismissing the County (A. 2).

Argument on the motion for reconsideration in the *Rundle* case and further argument in the *Moor* case on the diversity jurisdiction issue were heard on May 21, 1971. On August 25, 1971, the district court issued an order in the *Moor* case which rejected the plaintiff's diversity jurisdiction contention (Appendix E to the Petition for Writ of Certiorari, at 18). On August 30, 1971, the district court issued an order in the *Rundle* case which rejected the plaintiffs' pendent jurisdiction contention as to the state law claims (Appendix F to the Petition for Writ of Certiorari, at 21).

On September 3, 1971, the plaintiffs in both cases filed a request for entry of final judgment as to less than all parties under Rule 54(b) of the Federal Rules of Civil Procedure in order to bring the jurisdictional issues discussed above to the attention of the court below as expeditiously as possible (A. 3). The district court thereafter filed an order in each case authorizing the entry of a partial judgment in each case (A. 20 and A. 37, respectively), and on September 20, 1971, a judgment was signed in each case dismissing the County as a party defendant (A. 21 and A. 38, respectively).

On October 18, 1971, plaintiffs filed their notice of appeal in each case (A. 3).

On April 12, 1972, the court below affirmed the dismissal of the County in each case. (Appendix A to the Petition for Writ of Certiorari, at 1). A timely petition for hearing was filed on April 24, 1972 and subsequently denied on May 30, 1972, (Appendix B to the Petition for Writ of Certiorari, at 13).

A petition for a Writ of Certiorari was filed in this Court on June 30, 1972 and granted on October 10, 1972.

Summary of Argument.

Plaintiffs' primary contention is that because of 42 U.S.C. §1988 a federal district court has jurisdiction under 28 U.S.C. §§1343(3) and (4) to impose vicarious liability created under state law upon a public entity for violations of the Civil Rights Acts (42 U.S.C. §§1981 *et seq.*) committed by the entities' employees.

In urging this contention, plaintiffs are not taking issue with the holding in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) that public entities are not "persons" under 42 U.S.C. §1983. However, plaintiffs submit that the extent of that holding is simply that Congress, when it enacted §1983, did not intend for that provision to impose vicarious liability upon a public entity. Implicit in *Monroe*, though, and in the legislative debates that it relied upon, is that if state law imposed such vicarious liability upon its public entities then a federal court could, consistent with its jurisdictional requirements, impose that state-created liability.

To reach this result plaintiffs rely heavily upon 42 U.S.C. §1988 which, by its terms, authorizes a federal court to adopt state law in order to render the Civil Rights Acts fully effective. Inherent in plaintiffs' position is that California law imposes liability upon its

public entities for violations of the Civil Rights Acts committed by their employees. Thus, plaintiffs are saying that whereas the County's liability for the Civil Rights Acts violations of its employees is based upon state law, jurisdiction exists in the district court to impose that liability because of §1988 and 28 U.S.C. §§1343(3) and (4).

With respect to the pendent state law claims, if there is a basis for federal jurisdiction over the County, as urged above, then well-accepted concepts of pendent jurisdiction would apply. If, however, a basis of federal jurisdiction over the County cannot be found, then plaintiffs take the position that the district court has the power to and should assume jurisdiction over the County on the pendent state law claims. This is because the pendent state law claims are otherwise properly before the district court due to the presence of the other defendants, and because the County would clearly be a defendant on those pendent state claims had they been brought in a state court.

Furthermore, the presence of the County as a defendant will add no major issues to the cases nor extend their time of trial since the County's liability is vicarious and depends primarily upon the simple issue of whether the defendant employees were acting within the scope of their employment. To thus join the County as a pendent party would truly promote judicial economy and avoid multiple litigation.

Finally, in the *Moor* case only the plaintiff submits that in view of the overwhelming weight of federal authority, the court below erred in concluding that a county in California is not a "citizen" for diversity jurisdiction purposes.

ARGUMENT.

I.

42 U.S.C. Section 1988 Authorizes a Federal Court to Adopt State Law That Imposes Vicarious Liability Upon Its Public Entities for Violations of the Civil Rights Acts (42 U.S.C. §1981 et seq.) Committed by the Entities' Employees, and 28 U.S.C. Sections 1343(3) and (4) Confer Jurisdiction to Impose That State-Created Liability.

A. Analysis of Applicable Federal Law.

Plaintiffs' initial contention is that R.S. §722, 42 U.S.C. §1988 (hereinafter "§1988") authorizes a federal court to adopt state law that imposes vicarious liability upon its public entities for the violations of the Civil Rights Acts (42 U.S.C. §§1981 *et seq.*) committed by the entities' employees and, thereby, to acquire jurisdiction pursuant to 28 U.S.C. §§1343(3) and (4) over those public entities to impose that state-created liability. In urging this contention plaintiffs are not taking issue with the holding in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961), that Congress did not intend to impose vicarious liability upon a public entity when it enacted R.S. §1979, 42 U.S.C. §1983 (hereinafter "§1983"), nor are plaintiffs seeking to enlarge the scope of §1983 as defined in *Monroe*. Rather, plaintiffs contend that there is nothing inconsistent with the holding in *Monroe* that Congress did not intend to impose a federally created liability upon public entities for §1983 violations committed by the entities' employees and a holding herein that a state may impose a state-created liability upon its public entities for such employee violations, which liability a federal court, in turn, has jurisdiction to impose.

In support of this contention, plaintiffs rely upon §1988, which provides in pertinent part:

> "[I]n all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law . . . of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ."

With respect to §1983, if, as *Monroe* held, the purpose of that Section was to provide a federal remedy for the deprivation of a constitutional right, which remedy is over and above any arguable state remedy for such deprivation, *Monroe v. Pape*, 365 U.S. at 174,[3] and if, because of a belief that Congress was without the power to extend the scope of that federal remedy to encompass public entities, Congress limited §1983's scope to "persons" apart from public entities, *Monroe v. Pape*, 365 U.S. at 187-192, then §1983 is not fully "adapted to the object" or is "deficient in the provi-

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[3]In a concurring opinion Messrs. Justices Harlan and Stewart attached even more significance to §1983:

> "The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter, is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. . . ." 365 U.S. at 196.

sions necessary to furnish suitable remedies." For, despite the personal liability of an individual defendant, a great number of abuses may still go unremedied simply because the offender is judgment-proof. Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.Cal.L.Rev. 131, 136-137 (1972). *Cf. Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966). Thus, to the extent that state law cures this limitation upon the effectiveness of §1983 by imposing vicarious liability upon the offender's public entity employer, that state law is consistent with the Constitution and laws of the United States. *Cf. Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955). In both of these Civil Rights Acts cases the federal court looked to state law that imposed liability upon a sheriff for the acts of his deputy.

When presented with this analysis, however, the court below in essence ignored it and relied instead upon its earlier opinion in *Brown v. Town of Caliente*, 393 F.2d 546 (9th Cir. 1968). That reliance, though, is not responsive to the issue since *Brown* holds only that liability under §1983 cannot be enlarged by state law, whereas the issue is whether a federal court can impose a state-created liability irrespective of the scope of §1983.

While plaintiffs have not found a case which analyzes this precise issue, in response to *Brown* plaintiffs cited *Carter v. Carlson*, 447 F.2d 358, 369 (D.C. Cir. 1971); *petition for cert. filed*, 40 U.S.L.W. 3308 (U.S.

Oct. 26, 1971) (No. 71-564), *cert. granted sub nom.* 404 U.S. 1014 [92 S.Ct. 683, 30 L.Ed.2d 661] (1972), which ruled, contrary to the court below, that the scope of §1983 could be enlarged through §1988's adoption of state law.[3] Though conceptually plaintiffs are approaching the issue from a different premise than *Carter*, namely the jurisdiction of a federal court to impose a state-created liability as opposed to an expanded scope of federal liability, the net result for the plaintiffs is the same; to wit, the imposition of vicarious liability upon a public entity.

The court below, however, when confronted with *Carter*, refused to adopt its approach, stating:

> "Insofar as the *Carter* case would impose liability under section 1988 on municipalities other than the District of Columbia, *it is inconsistent with our decision in* Brown v. Town of Caliente *and we do not follow it.*" Appendix A to Petition for Writ of Certiorari, at 6. (Emphasis added.)

The Seventh Circuit Court of Appeals has also purported to deal with the §1988 issue in *Ries v. Lynskey*, 452 F.2d 172 (7th Cir. 1971). However, while recognizing the above dichotomy of opinion between the *Brown* court and the *Carter* court on the scope of *Monroe*, the *Ries* court avoided the issue by resting its decision on an analysis similar to *Brown*, namely that state law could not enlarge the scope of §1983. *Id.* at 175.

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[3]Plaintiffs have not urged the expanded scope of §1983 analysis urged by the respondent in *Carter*, but do support such analysis as an alternative approach. However, to avoid repetition, and because plaintiffs believe that the approach they suggest is more logically consistent with *Monroe*, plaintiffs will leave the expanded scope of §1983 analysis to the respondent in *Carter*.

Thus, to date there has been no opinion which has actually dealt with the issue raised herein. As a result, *Monroe v. Pape, supra,* and the legislative history of the Civil Rights Acts must be analyzed for the answer.

Monroe involved an action under §1983 against Chicago policemen and the City of Chicago as their employer for damages for alleged atrocities committed by the policemen. While this Court recognized a federal right of action against the policemen, it held that no such federal right of action existed against the City because it believed that Congress intended to exclude municipalities as defendants from the meaning of the term "person" in §1983 (365 U.S. at 191). That this was the limit of what the Court held and that there was no issue in *Monroe* of state waiver of immunity or of any other section of the Civil Rights Acts except §1983 can be seen in the Court's statement concerning the scope of what it was considering:

> "Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by §1979 [42 U.S.C. §1983]. Accordingly, only that section is before us." 365 U.S. at 169-170, n. 2.

In reaching its decision on the scope of §1983 the Court examined the legislative history of the 1871 Civil Rights Acts. A review of that legislative history shows that while it can be said to support *Monroe* when limited to its facts, it also can be said to support the plaintiffs' contention concerning a federal court's jurisdiction to impose a state-created liability.

The legislative history relied upon in *Monroe* was not anything in the debates on §1983, for those de-

bates contain no discussion of municipal liability, but rather was on the rejection by Congress of another proposed section, the so-called Sherman Amendment, which would have imposed federal liability upon counties and/or cities in which attacks on Negroes occurred.[4] In referring to those debates, the Court in *Monroe* noted that the House of Representatives twice rejected the Sherman Amendment because:

> ". . . in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." 365 U.S. at 190.

That statement is from a quote by Representative Poland, a firm supporter of the Civil Rights Acts, but the leader of the opposition to the Sherman Amendment. See Cong. Globe, 42d Cong., 1st Sess. 804 (1871). Similar statements concerning a lack of power in the federal government to impose this kind of liability upon cities and counties can be seen in the statements of Representatives Kerr, Willard and Blair. *Id.* at 788, 791 and 795 respectively.

This analysis illustrates the impossibility of drawing from the Sherman Amendment debates any negative inference concerning vicarious municipal liability for violations of the Civil Rights Acts committed by its employees where municipalities are vicariously liable under state law. On the contrary, the theory upon which Congress rejected the Sherman Amendment would, in fact, compel the inference that Congress intended municipalities to be liable under the Civil Rights

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[4]The two slightly different versions of the Sherman Amendment are printed in *Monroe* at 365 U.S. 167, nn. 38 and 41.

Acts to the extent that they are liable under state law. *See* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.Cal.L.Rev. 131, 136 (1972). This is because of a belief that the state had exclusive power to define the attributes of its agencies and that the federal government could regard them in no other fashion than as the state had defined them. Thus, the federal government could no more endow counties and cities with immunity than with liability; it must take them as it found them. In so doing, however, if state law imposed a particular liability upon its local entities, federal courts, consistent with their jurisdictional restrictions, could impose that liability. For, as observed by Representative Poland:

> "I presume, too, that where a state had imposed a duty upon such municipality, and provided they should be liable for any damages caused by failure to perform such duty, *that an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction.* But the enforcing of a liability, existing by their own contract, or by a state law, in the [federal] courts, is a very widely different thing from devolving a new duty or liability upon them by the national government, which has no power either to create or destroy them, and no power or control over them whatever." Cong. Globe, *supra* at 794. (Emphasis added.)

Similar statements were made by Representatives Kerr, Blair, Burchard and Bingham, *id.* at 789, 795 and 798, respectively. *See also* Kates & Kouba, *supra* at 158-159.

Yet, in spite of this legislative history and the obvious restrictive import of *Monroe*, the decision of the court below goes far beyond *Monroe*, and defeats the Congressional purpose enunciated in §1988 to supplement the Civil Rights Acts with all remedies available under state law. In so doing the court below ignored the principle of §1988 enunciated in *Brazier v. Cherry*, 293 F.2d 401, 409 (5th Cir. 1961), to wit: ". . . what is needed in the particular case under scrutiny to make the civil rights statutes fully effective?" This principle was recognized by this Court in *Sullivan v. Little Hunting Park*, 395 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969):

> "This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. Brazier v Cherry, 293 F2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."

See also Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961) (§1988 used to adopt state law concerning survival of actions).[5]

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[5]In *Sherrod v. Pink Hat Cafe*, 250 F.Supp. 516, 519 (N.D. Miss. 1965), the court stated with respect to §1988:

> "This is a broad congressional direction to the federal court system to draw on state law when to do so will carry out and fulfill the purposes of other congressional enactments designed to protect persons in their civil rights. The Civil Rights Act of 1964 is such an enactment, designed to protect persons in such rights and in particular to protect them in the right to equal and non-discriminatory treatment in public accommodations. *Hence, state law may be resorted to here to supply a remedy in damages that is not specifically provided by the Civil Rights Act of 1964.*" (Emphasis added.)

Likewise, state law should be resorted to herein to supply a remedy in damages that is not specifically provided by §1983.

Given the fact that a plaintiff cannot, as a practical matter, bring a costly action under the Civil Rights Acts against police officers who abuse their authority unless there is some hope of recovery, and recognizing that if the plaintiffs prevail it is unlikely that any of the individual defendants could satisfy a large judgment from their own assets or insurance (*cf. Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966)), unless a federal court utilizes §1988 to adopt state law that imposes vicarious liability upon its public entities, the civil remedy afforded by §1983 is rendered relatively ineffective. Thus, as Messrs. Kates and Kouba state:

> "As previously suggested, without municipal liability, the federal civil liability imposed upon government officials has proved insufficient to fulfill the objectives of the Civil Rights Act. By providing responsible defendants, municipal liability will help restore plaintiffs to their *status quo ante* and may encourage behavioral reform to the currently unsatisfactory state agencies. There is no reason to believe that the Georgia wrongful death statute in *Brazier* is somehow more suitable for incorporation than a state municipal liability statute. A severely wounded plaintiff who cannot collect his award because the individual defendants are judgment proof is as disadvantaged as the widow in *Brazier* who was not expressly protected under a federal statute. In both cases, the constitutionally protected rights may be meaningless without the state statute." Kates & Kouba, *supra* at 157.

Given, therefore, this need for vicarious liability of public entities and the fact that such liability, if created by state law, is not inconsistent with *Monroe* or the

Civil Rights Acts, §1988 should clearly apply to adopt such state law. In *Bell v. Hood*, 327 U.S. 678, 684 [66 S.Ct. 773, 90 L.Ed. 939] (1946), this Court stated:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy* to make good the wrong done." (Emphasis added.)

To effectuate this mandate, plaintiffs submit that the analysis to apply is exemplified, ironically, by a decision of the court below, albeit in a slightly different context, in *Hesselgesser v. Reilly*, 440 F.2d 901, 902-903 (9th Cir. 1971):

> "The Civil Rights Act does not itself specifically establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. The applicable section, 42 U.S.C. §1983, speaks only of '(e)very person who * * * subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights * * *.' Thus if one who did not participate in such violation is to be held liable for the civil rights violation of another on principles of vicarious liability, or by reason of statutory responsibility, it must be because: (1) the Civil Rights Act gives recognition to the laws of the states pertaining to such liability and, (2) the laws of the particular state where the action arose create such liability.

"We think the Civil Rights Act does authorize the application, under appropriate circumstances, of state laws pertaining to vicarious liability and liability created by statute. Under 42 U.S.C. §1988, quoted in the margin, where the laws of the United States are deficient in the provisions necessary to furnish suitable remedies, the common law, as modified and changed by the constitution and statutes of the state wherein the case arose, shall govern the trial and disposition of civil rights actions, so far as the same is not inconsistent with the Constitution and laws of the United States. . . ."

The only difference between the instant cases and *Hesselgesser* is that in *Hesselgesser* the court below, through §1988, looked to Washington law that imposed vicarious liability upon a sheriff for the §1983 violations of a duputy. While *Hesselgesser* gave no explanation of its basis for jurisdiction, which, in turn, caused the district court in these cases a certain amount of consternation (*see* Appendix F to the Petition for Writ of Certiorari, at 28-30), it would seem that the court below had to rely for jurisdiction upon 28 U.S.C. §§1343(3) and (4) since it has categorically rejected the notion that a party can be joined on a pendent state claim when he has no involvement in the related federal claim (*See* Appendix A to Petition for Writ of Certiorari, at 7-11). Moreover, the effort of the court below to explain *Hesselgesser* by reference to §1983 liability concepts (*id.* at 6) is irrelevant since only a state-created liability was being imposed.

Another example of a case applying the concept urged by plaintiffs in an almost indistinguishable situation is *McArthur v. Pennington*, 253 F.Supp. 420 (E.D. Tenn. 1963). In *McArthur* the public entity

initially submitted to the court's jurisdiction in connection with a suit predicated upon violations of the Civil Rights Acts by the entity's employees. After trial, the public entity sought to avoid the imposition of liability on the ground that it could not be held liable under the Civil Rights Acts. The court agreed with that contention, but went on to hold that it had jurisdiction to impose liability upon the public entity because it had waived its immunity from liability by purchasing liability insurance. Here plaintiffs contend that the County has waived its immunity from liability by state law and by procuring insurance.

McArthur thus highlights the point that if there is a state law basis for finding that a public entity has waived its immunity from liability for violations of the Civil Rights Acts committed by its employees, such as by purchasing liability insurance or by a state statute imposing such liability, a federal court can impose that state-created liability upon the public entity.

Finally, if §1988 can be used by a federal court to adopt state law that imposes vicarious liability upon its public entities for violations of the Civil Rights Acts committed by the entities' employees, the only remaining question concerns the court's jurisdictional basis to impose that liability. In this connection 28 U.S.C. §1343(4) provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ". . .
>
> "(4) To recover damages . . . under *any* Act of Congress providing for the protection of civil rights . . ." (Emphasis added.)

Given the context of §1988, as well as the judicial interpretations afforded it, it is patent that §1988 is, in fact, an "Act of Congress providing for the protection of civil rights." *Cf. Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969).

For these reasons plaintiffs submit that §1988 can be used by a federal court to adopt state law that imposes vicarious liability upon its public entities for violations of the Civil Rights Acts committed by the entities' employees and thereby acquire jurisdiction pursuant to 28 U.S.C. §§1343(3) and (4) to impose that state-created liability.

B. Analysis of Applicable State Law.

Inherent in plaintiffs' contention concerning §1988 is the fact that California law has imposed vicarious liability upon its public entities for violations of the Civil Rights Acts committed by the entities' employees. While this point was briefed both in the court below and in the district court, no opinion was ever rendered by either court since they both concluded that §1988 could not be used to adopt such state law. However, since plaintiffs' conception of California law is crucial to their Civil Rights Acts analysis, plaintiffs offer the following California authority in support of their position.

The starting point for analysis is the California Tort Claims Act of 1963 (§§810 *et seq.*, California Government Code) (hereinafter "Tort Claims Act"). In particular, §815.2(a), Cal. Gov't Code, provides:

> "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if

the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

Plaintiffs maintain that the above-described vicarious liability imposed upon a public entity arises irrespective of the nature of the cause of action that gives rise to the employee's liability. In other words, whether the employee's liability is predicated upon common law, state law or federal law is beside the point. If the employee, while acting within the scope of his employment, is held liable on "a cause of action," then under §815.2(a) the public entity is liable.

Nothing contained in §815.2(a) or the Tort Claims Act in general purports to restrict the term "cause of action" to only common law or state law causes of action. The term itself has been defined in California to encompass numerous theories of recovery. As stated in *South Shore Land Co. v. Petersen*, 226 Cal.App.2d 725, 739-740 [38 Cal.Rptr. 392] (1964):

> "The essence of a cause of action is the existence of a primary right and one violation of that right, i.e., it arises out of an antecedent primary right and corresponding duty, and a breach of such primary right and duty by the person upon whom that duty rests. (*Shell v. Schmidt*, 126 Cal.App.2d 279, 291 [272 P.2d 82]; *Smith v. Minnesota Mut. Life Ins. Co.*, 86 Cal.App.2d 581, 590 [195 P.2d 457]; *Stryker v. Republic Pictures Corp.*, 108 Cal.App.2d 191, 195 [238 P.2d 670]; *Frost v. Witter*, 132 Cal. 421, 426 [64 P. 705, 84 Am. St.Rep. 53]; *Work v. County Nat. Bank etc. Co.*, 4 Cal.2d 532, 540 [51 P.2d 90]; *Wulfjen v. Dolton*, 24 Cal.2d 891, 895 [151 P.2d 846].) The

primary right and duty and the delict or wrong constitute the cause of action in the legal sense. (*Smith v. Minnesota Mut. Life Ins. Co., supra,* p. 590.) 'The cause of action is simply the obligation sought to be enforced.' (*Panos v. Great Western Packing Co.,* 21 Cal.2d 636, 638 [134 P.2d 242]; *Eichler Homes of San Mateo, Inc. v. Superior Court,* 55 Cal.2d 845, 847 [13 Cal.Rptr. 194, 361 P.2d 914].) 'The cause of action is to be distinguished from the remedy which is the means by which the obligation or the corresponding action is effectuated, and also from the relief sought.' (*Smith v. Minnesota Mut. Life Ins. Co., supra,* p. 590.) Accordingly, if the action is brought to enforce a single right violated by the defendant, the complaint states but one cause of action regardless of the number of types of relief sought *and notwithstanding that it alleges several theories of recovery.* (*Shell v. Schmidt, supra,* p. 291; *Merlino v. West Coast Macaroni Mfg. Co.,* 90 Cal. App.2d 106, 115 [202 P.2d 748].) Consonant with this latter principle is the rule that 'All damages arising from a single wrong, though at different times, make but one cause of action.' (*Hall v. Susskind,* 109 Cal. 203, 209 [41 P. 1012]; *Sanders v. Allen,* 83 Cal.App.2d 362, 366-367 [188 P.2d 760].)" (Emphasis added.)

In the instant case, plaintiffs seek damages for injuries arising as a result of alleged wrongful conduct on the part of the defendant employees of the County. These damages are sought on a number of different theories. But, notwithstanding that the complaints allege several theories of recovery, they each state but one cause of action under California law. If the plaintiffs

can prevail upon any one of these theories, and if the defendant employees can be shown to have been acting within the scope of their employment, the County is vicariously liable under §815.2(a).

Support for the position urged by plaintiffs can also be found in another provision of the Tort Claims Act. Section 995, Cal. Gov't. Code, obligates the County to provide for the defense "of *any* [emphasis added] civil action or proceeding" brought against the employee "on account of an act or omission in the scope of his employment as an employee of the public entity" if the employee requests such assistance. *Cf. Sinclair v. Arnebergh*, 224 Cal.App.2d 595, 597-598 [36 Cal.Rptr. 810] (1964). In the instant cases counsel for the County are also counsel for the employee defendants.

The legislative history of the Tort Claims Act further supports plaintiffs' position. When the Tort Claims Act was being considered, the California Law Revision Commission that had proposed the legislation submitted a report entitled *A Study Relating to Sovereign Immunity* published in 5 Cal. Law Revision Com., Reports, Recommendations and Studies (1963). With respect to the precise question involved, the report noted:

> "*The issue relevant to the present study, of course, is whether public entities, notwithstanding their immunity from direct liability under the Civil Rights Act, should assume financial responsibility* (whether through payment of insurance premiums to protect their personnel, or through assumption of payment of judgments against such personnel) *for violations by their police officers of that Act.* By analogy to suggestions of-

fered earlier, *it is believed that consideration should be given to adoption of statutory provisions, . . . under which public entities in California would be required to assume ultimate financial responsibility for such torts of their police officers,* except where they acted through malice, fraud, corruption or with wrongful intent." *Id.* at 455. (Emphasis added.)

Subsequent to the enactment of the Tort Claims Act, Professor Arvo Van Alstyne, who is one of the leading commentators on the subject of the Tort Claims Act, observed:

"It is surely arguable, however, that a civil rights action can be maintained against a public entity in California, in view of the statutory declaration here that public entities are liable for injuries that are actionable against their employees. Govt C §815.2(a). But public entities when so sued may be permitted to assert any immunities recognized by state law (see, *e.g.*, Govt C §844.6), for *Monroe* seems to exclude public entities from the purview of the federal Civil Rights Act for the reason that (and thus, perhaps, only to the extent that) traditional concepts of sovereign immunity as recognized by state law were intended to be left undisturbed by Congress. *To the extent that state law, as in California, admits liability of public entities for the torts of their employees, the reasons for limiting the application of §1983 to public employees no longer are persuasive.*" Van Alstyne, California Government Tort Liability, §7.8, at 291-292 (CEB 1964). (Emphasis added.)

Therefore, given the facts that (i) both before and after the enactment of the Tort Claims Act its authors have urged that it extend to Civil Rights Acts liability of public employees, (ii) the Tort Claims Act itself seems to encompass such liability, (iii) California law would clearly hold the County liable on a judgment against the individual defendants on the pendent state law claims which arise from the identical conduct complained of in the federal claims, *Scruggs v. Haynes*, 252 Cal.App.2d 256 [60 Cal.Rptr. 355] (1967), and (iv) there is no authority indicating any contrary intent, plaintiffs submit that California has provided a cause of action against its public entities when the underlying liability of the public employee is predicated upon a Civil Rights Acts violation. Thus, in assuming federal jurisdiction over the County this court would not be creating a new cause of action nor violating the spirit of *Monroe* by holding that a federal court could impose that state-created liability upon the County. Such result, moreover, would be consistent with the general policy in California concerning the Tort Claims Act. For, as noted in *Larson v. City of Oakland*, 17 Cal.App.3d 91, 97-98 [94 Cal.Rptr. 466] (1971):

> "In connection with governmental tort immunities, the Supreme Court has announced that liability is the rule, immunity is the exception. (*Johnson v. City of Pacifica* (1970) 4 Cal.App.3d 82, 85, 89 [84 Cal.Rptr. 246].) . . .
>
> "It is significant, perhaps, that the rule where immunities are concerned is for strict construction; not for judicial definition, to enlarge immunities."

The only argument offered by the County in the court below in opposition to this analysis of California

law was that a "Pandora's Box of extraneous issues" would result. Yet, in point of fact the very issues which the County claims would be added to the cases if it were made a party defendant are either totally irrelevant or now already involved irrespective of the County's status as a party defendant. This is because the plaintiffs' cases against the County's employees are predicated not only upon the Civil Rights Acts, but also, under pendent jurisdiction, upon California law.

In order to maintain an action against these employee defendants on the state law claims certain state law prerequisites must be met. For example, §950.2, Cal. Gov't. Code, provides in pertinent part:

> "[A] cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immmune [sic] from liability for the injury."

In commenting upon this provision, the California Law Revision Commission stated:

> "This amendment makes it clear that suit against a public employee or former employee is barred when a suit against the entity is barred (1) by failure to present any claim at all or (2) by presenting a claim that is insufficient, too late or for any other reason inadequate to support an action against the employing public entity. . . .

Likewise, if suit against a public entity is barred by the applicable statute of limitations or by any other provision in Chapter 2 of Part 4 dealing with actions against public entities, suit against the public employee or former employee is also barred.

"The addition of the last sentence to this section eliminates an existing ambiguity by providing that the presentation of a claim to the employing public entity is a prerequisite to suit against an employee notwithstanding the fact that the applicable substantive law may declare the entity to be immune from liability for the injury. Because the employing public entity is financially responsible for judgments against its employees (see Section 825), the presentation of a claim is required in all cases." West's Annotated California Codes, Vol. 32 at 382-383 (1966).

Thus, the County's arguments concerning the inclusion of instructions relating to California Tort Claims Act procedural requirements and separate statutes of limitations are wholly without merit since the same kinds of instructions will have to be given on plaintiffs' pendent state law claims irrespective of whether the County is a party defendant.

Moreover, even though the California Tort Claims Act statute of limitations applicable to the pendent state law claims against the defendant employees is not applicable to the Civil Rights Acts claims against the employees, *Willis v. Reddin*, 418 F.2d 702, 704-705 (9th Cir. 1969), to the extent that the Civil Rights Acts claims were timely filed under the California Tort Claims Act (which they were herein) there is no reason

why, consistent with California law, vicarious liability for those violations should not be imposed upon the County.

In the final analysis there can be no question of California's right to choose to impose vicarious liability upon its public entities for violations of the Civil Rights Acts committed by their employees. That California may choose to condition such vicarious liability upon compliance with certain procedures, or upon a limitations period that differs from the limitations period applicable to the federal right against the employees, should in no way affect a federal court's jurisdiction to impose that state-created vicarious liability if the state prerequisites are met. To do so neither circumvents state law nor affects the scope of §1983.

II.

A Federal Court Has the Power to Exercise Jurisdiction Over a Party on a Pendent State Law Claim Even Though Such Party Is Not Involved in the Related Federal Claim.

In this portion of their brief, plaintiffs assume *arguendo* that there is no independent basis of federal jurisdiction over the County; for, if such basis exists then under well-accepted principles of pendent jurisdiction the district court would also have jurisdiction over the County with respect to the pendent state law damage claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966).

However, apart from the question of whether federal jurisdiction over the County exists to impose a state-created vicarious liability for violations of the Civil Rights Acts committed by the County's employees, or even whether such vicarious liability exists under Cali-

fornia law, plaintiffs submit that because California law imposes vicarious liability on the County for the state law violations of its employees, §815.2(a), Cal. Gov't. Code; *Scruggs v. Haynes*, 252 Cal.App.2d 256 [60 Cal. Rptr. 355] (1967), that the principles inherent in the doctrine of pendent jurisdiction allow the district court the power to exercise jurisdiction over the County with respect to these pendent state law claims. This is true even though there is no independent basis of federal jurisdiction over the County. *See* Note, *U.M.W. v. Gibbs and Pendent Jurisdiction*, 81 Harv. L.Rev. 657, 662 (1968).

Recognition of this concept of pendent jurisdiction has occurred in a number of opinions of the circuit courts of appeals emanating from the decision in *United Mine Workers v. Gibbs, supra.* Those cases are *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968); *Connecticut Gen'l Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968); *Wilson v. American Chain and Cable Co.*, 364 F.2d 558 (3rd Cir. 1966).

In viewing this post-*Gibbs* trend of decisions, it is significant to note that joinder of a pendent party was accomplished in a number of different circumstances. They ranged from joinder of a pendent party defendant in a variety of federal question cases (*Leather's Best, Astor-Honor* and *Connecticut Gen'l Life Ins. Co.*) to joinder of such a defendant in diversity cases (*Stone* and *Jacobson*) to joinder of pendent party plaintiff in diversity cases (*Hatridge* and *Wilson*). Thus, at this

stage of the concept's development it can be said that it is not unique to any one particular type of case.

Exemplifying the kind of analysis used to accomplish pendent party joinder are the following observations from *Astor-Honor*, which involved the question of whether a party who was not named as a defendant in the plaintiff's federal copyright law claims arising under 28 U.S.C. §1338(a) could still be joined on an alleged unfair competiton claim under 28 U.S.C. §1338(b). While the court ultimately decided the matter upon a liberal reading of §1338(b), it also made the following statements:

> "There are indeed many statements supporting 'the general proposition' enunciated by the district court, notably, for our proposes, that in Wasserman v. Perugini, 173 F.2d 305, 306 (2 Cir. 1949), where this court declared that in the absence of diversity, a federal court did not have jurisdiction over individual defendants on a state tort claim arising from the same accident which was the basis of a separate count against the United States under the Federal Tort Claims Act. However, '[c]ases antedating [United Mine Workers (of America) v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966),] that denied judicial power, i.e., jurisdiction, over the pendent claim are suspect as authority.' 3A Moore, Federal Practice ¶ 18.07[1.-4] (1970). The Gibbs Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725, 86 S.Ct. at 1138:
>
> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that

he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. (Emphasis the court's.)

Although the pendent claim in **Gibbs** ***did not include a party not named in the federal claim, Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also.*** See Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv.L. Rev. 657, 664 (1968). A plaintiff with claims against three alleged conspirators for the same set of acts 'would ordinarily be expected to try them all in one judicial proceeding,' assuming that all defendants were subject to the process of the court. It would be an unjustifiable waste of judicial and professional time—indeed, a travesty on sound judicial administration—to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset 'in a State court a block away.' The absence of any constitutional barrier to entertaining a sufficiently related state claim against a person who was not party to the federal claim was recognized, prior to *Gibbs*, in cases involving compulsory counterclaims under F.R.Civ.P. 13(a), United Artists Corp. v. Masterpiece Productions, Inc., 221 F.2d 213 (2 Cir. 1955), and third party claims under F.R.Civ.P. 14, Dery v. Wyer, 265 F.2d 804 (2 Cir. 1959); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3 Cir. 1962). The only post-*Gibbs* court of appeals de-

cision that has been called to our attention which involved the joinder as defendants of persons not parties to the claim supporting federal jurisdiction is Williams v. United States, 405 F.2d 951, 955 (9 Cir. 1969). This presented the same problem as this court had faced, long before *Gibbs*, in Wasserman v. Perugini, *supra*, namely, the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. Although the *Williams* court approved the district court's dismissal of these defendants, we are not at all sure we would agree with this insofar as the decision rested on a general theory of lack of power." 441 F.2d at 629-630. (Emphasis added.)

Taking the *Astor-Honor* analysis, if it has any validity at all it should be, at least, in the context of federal question cases. This is because such cases involve an interpretation and application of federal law, and federal courts are preferable for such purpose. ALI Study of The Division of Jurisdiction Between State and Federal Courts, 164-168 (1969). Some of the reasons advanced by the Study for preferring federal courts for federal question cases are: (i) "a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts," (ii) a belief "that greater uniformity [of decisions] results from hearing these cases in a federal court," and (iii) a belief "that federal courts are more likely to apply federal law sympathetically and understandingly than are state

courts." In addition to these considerations, the Study observes:

> "Finally, determinations of fact by the state court are subject to at most limited review in the Supreme Court. The federal rights of a party will frequently depend upon what the facts are found to be—*see Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 228 (1908)—and an appeal, after the case has been shaped by the fact findings of an unsympathetic state court, is as Chief Justice Marshall long ago observed, an 'insecure remedy.' *Osborn v. Bank of the United States*, 9 Wheat. 738, 822 (1824)." *Id.* at 167-168.

These same considerations are obviously not applicable in diversity cases where state law is being interpreted and applied. Yet, even in those types of cases pendent party joinder has been accomplished. *A fortiori* such joinder should be authorized in a federal question case.

However, in spite of this trend of post-*Gibbs* decisions, and the compelling policy considerations for allowing pendent party joinder in, at least, federal question cases, the court below relied entirely upon its earlier decision in *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969) and expressly refused to authorize such joinder, stating:

> "However, there are numerous decisions which have reached the opposite conclusion. Moreover, at least one authority has expressed the view that pendent jurisdiction should not be available to bring in a different party on a solely state claim merely because that claim is related to a federal claim against an existing party. Another has

stated that it is by no means certain that pendent jurisdiction permits joinder of a party against whom no federal claims exist. Furthermore, *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), a case critical of our decision in *Hymer* and strongly relied upon by appellant, has itself been criticized as having 'strained for jurisdiction.'" (Appendix A to the Petition for Writ of Certiorari, at 8-9.)

". . .

"We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims." (Appendix A to the Petition for Writ of Certiorari, at 10).

Having, thus, clearly reiterated its position in *Hymer*, that federal district courts in the Ninth Circuit do not have the power to consider whether to exercise jurisdiction on a pendent state claim over a party who is not involved in the related federal claim, the court below went on to intimate that the district court, as a matter of discretion, refused to exercise jurisdiction. Plaintiffs submit, however, that the court below erred in attributing to the district court a holding that it would not, as a matter of discretion, hear the state claims against the County when the district court specifically stated in its opinion that in view of *Hymer*, it "is devoid of the power to adjudicate the state claim against

the County; *the issue is not one of discretion.*" (Appendix F to the Petition for Writ of Certiorari, at 23) (Emphasis added).

While the district court intimated it might choose not to hear the state claims, assuming it had discretion to do so, such intimation in no way reflected the district court's final word on the matter. Indeed, the district court in footnote 5 of its order specifically stated that it was not expressing any opinion on what it would do if it were free of the influence of *Hymer* (*Id.* at 27-28). Thus, to uphold the district court's decision on the ground that it exercised its discretion in refusing to take jurisdiction over the County is simply contrary to what the district court did and unfair to plaintiffs. At a minimum, if the lack of power concept in *Hymer* is to be reversed so that the district court might have the power to exercise its discretion, then the matter ought to be sent back to the district court for consideration in the light of that knowledge.

It should also be apparent that in spite of the allusion by the court below to an exercise of "discretion" by the district court, the fact still remains that as a result of the decision by the court below federal district courts in the Ninth Circuit are now without the power to exercise jurisdiction on a pendent state law claim over a party who is not involved in a related federal claim.

In support of its decision, the court below claims to have found "ample support" in *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) and *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965). But, the fact is that neither can

be said to support the lack of power concept. In *Patrum* the court expressly recognized the power of the district court to join the city and merely upheld the district court's exercise of discretion to refuse to join the City. As for *Wojtas*, it was decided before *Gibbs* and must be viewed accordingly. Thus, only the Ninth Circuit is contrary to the trend of post-*Gibbs* decisions in other circuits which expressly hold that pendent jurisdiction allows for the joinder of parties as well as claims.

Moreover, contrary to the observation of the court below that *Patrum* and *Wojtas* are the only two cases that involved the precise question raised herein, at least one federal district court has recently adopted petitioners' interpretation of *Patrum* and ruled that it did have the power to exercise jurisdiction over the City of Council Bluffs in a fact situation that is indistinguishable from the instant case. *See Eidschun v. Pierce*, 335 F.Supp. 603, 609-614 (S.D. Iowa 1971). Plaintiffs are, of course, of the view that the same kind of analysis that was made in *Eidschun* should be made herein. In addition, *Eidschun* points up that there is even a conflict in decisions on the precise question involved herein.

Given this conflict among the respective circuit courts of appeals, plaintiffs contend that the concern expressed in *Gibbs* in promoting economy, fairness and convenience to the parties, and the holding stated in *Gibbs* that pendent jurisdiction exists whenever (i) the state and federal claims are derived from "a common nucleus of operative fact," and (ii) the claims are such that a plaintiff would "normally be expected to try them all in one proceeding," require the conclusion that pendent jurisdiction allows for the joinder

of parties as well as claims. To hold otherwise would mean that the plaintiffs are compelled to file suit against the County's employees in the federal court under the Civil Rights Acts and pendent state law theories and suit against the County under the state indemnification law in the state court. The plaintiffs must then prove their case against the individual County employees in the federal court and, after obtaining a judgment, again prove their case in the state court sufficiently to collect from the County the judgment obtained in the federal court. That such procedure is less than satisfactory can be seen from the following observations:

> "The disadvantages of such a procedure are clear. Pendent jurisdiction seems to be appropriate in such cases because both claims would normally be tried in one proceeding and would require similar factual showings. For example, to sustain a Section 1983 claim of excessive force and/or false arrest against law enforcement officers a litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment (or other investigature with power) by a state or local governmental agency. To prove his state law claims against the police officers and their public employer the litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment by a governmental entity. A litigant seemingly could conclusively demonstrate the substantial identity of his federal and his state law claims by incorporating, *in haec verba,* the allegations of his federal causes of action when setting out his state cause of action. To require parties in cases such as this to relitigate the facts of their federal law claims in state court is to make federalism a

fetish rather than virtue." Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.Cal.L.Rev. 131, 163 (1972).

Thus, while it may well be that *Hymer* was binding upon the court below,[6] the fact still remains that in view of *Gibbs* and its progeny, its holding that pendent jurisdiction is not available to join parties is questionable as a valid proposition of law today. Moreover, the fact of *Hymer's* inconsistency with the logic of *Gibbs* and its progeny was pointed up in *Hatridge v. Aetna Casualty & Surety Company*, 415 F.2d 809, 817 (8th Cir. 1969), in an opinion written by Mr. Justice Blackmun prior to his appointment to this Court:

> "The Ninth Circuit, however, has refused to follow the Third Circuit precedent and has rejected pendent jurisdiction over a consortium claim. Hymer v. Chai, 407 F.2d 136, 137-138 (9 Cir. 1969). The court felt that it was bound by its earlier decision in an [sic] non-consortium case. Takashi Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9 Cir. 1940), cert. denied, 312 U.S. 700, 61 S.Ct. 739, 85 L.Ed. 1134. . . .
>
> "The Ninth Circuit decision hangs upon a case decided 29 years ago, long prior to *Gibbs* but subsequent to Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), where the doctrine of pendent jurisdiction, although not referred to by that name, was given some vitality. . . .

[6] There appears to be a long-standing rule of the court below that no three-judge panel can overrule another such panel on a similar though not identical issue, *Carson v. United States*, 310 F.2d 558, 561-562 (9th Cir. 1962); *Halprin v. United States*, 295 F.2d 458, 461 (9th Cir. 1961); *Ellis v. Carter*, 291 F.2d 270, 273 n. 3 (9th Cir. 1961); *Upton v. C.I.R.*, 283 F.2d 716, 723 (9th Cir. 1960).

"In any event, we find ourselves in sympathy with the Third Circuit approach for appropriate cases. *It makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time.* We feel that a consortium suit, in the light of its stated character under Arkansas law, is ideal for the application of the doctrine. We apply pendent jurisdiction as a supportive ground for our conclusion here." (Emphasis added.)

Plaintiffs submit, therefore, that on the basis of *Gibbs* and its progeny the district court clearly has the power to retain jurisdiction over the County in this case. Moreover, though this Court has not yet passed upon this precise question, it has recently indicated that pendent jurisdiction is important in settling the entire dispute between parties when there is a substantial federal question involved. In *Rosado v. Wyman*, 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207] (1970) the Court decided that even though the federal question had become moot, the district court had the power to decide the state claims involved. The Court felt that federal-state comity was not as important as conserving judicial energy and avoiding multiplicity of litigation. *Rosado* is important because the guidelines for exercising discretion were clarified. Judicial economy and avoidance of multiple litigation seemed to be the primary factors to be considered.

It must also be noted that these same considerations for the utilization of pendent jurisdiction would apply even more strongly if California law is held to impose vicarious liability upon its public entities for violations

of the Civil Rights Acts committed by their employees, but that somehow §1988 was not meant to recognize such state law. Then only general concepts of pendent jurisdiction could be cited to hold the County in the federal court with respect to the Civil Rights Acts claims.

In sum, so that persons in the Ninth Circuit may have the same jurisdictional rights as persons in other circuits, plaintiffs respectfully request that the Court hold that general concepts of pendent jurisdiction do furnish the district court with power to join parties as well as claims, and require the joinder of the County in this case.

III.

The County of Alameda Is a Citizen of California for Diversity Jurisdiction Purposes.

Apart from the jurisdictional issues discussed above, which related to both the *Moor* and *Rundle* cases, *Moor* involves an additional issue of diversity jurisdiction. Specifically, the question raised is whether the County of Alameda is a citizen of California for diversity jurisdiction purposes.

As a general proposition of law it would seem beyond question today that political subdivisions of a state, such as the County of Alameda, are citizens of their respective states for diversity jurisdiction purposes. See *e.g., Illinois v. City of Milwaukee,* .... U.S. .... [92 S.Ct. 1380, 31 L.Ed.2d 712] (1972); *Great No. Life Ins. Co. v. Read,* 322 U.S. 47 [64 S.Ct. 873, 88 L. Ed. 1121] (1944); *Milwaukee County v. M. E. White Co.,* 296 U.S. 268 [56 S.Ct. 229, 80 L.Ed. 220] (1935); *Chicot County v. Sherwood,* 148 U.S. 529 [13 S.Ct. 1695, 37 L.Ed. 546] (1893); *Lincoln County v. Luning,* 133 U.S. 529 [10 S.Ct. 363, 33 L.Ed.

766] (1890); *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 [19 L.Ed. 86] (1868). Thus, as recently stated in the unanimous opinion of this Court in *Illinois v. City of Milwaukee, supra:*

> "It is well settled that for the purposes of diversity of citizenship, political subdivisions are citizens of their respective States. Bullard v. City of Cisco, 290 US 179, 78 L Ed 254, 54 S Ct 177, 93 ALR 141; Cowles v. Mercer County, 7 Wall 118, 122, 19 L Ed 86, 87." (31 L.Ed.2d at 720).

This proposition of law concerning the citizenship status of counties has been, with the sole exception of the court below, uniformly followed by the circuit courts of appeals. *See e.g., Brown v. Marshall County, Kentucky*, 394 F.2d 498, 500 (6th Cir. 1968); *Pettibone v. Cook County, Minn.*, 120 F.2d 850 (8th Cir. 1941); *Pearl River County, Miss. v. Wyatt Lumber Co.*, 270 F. 26 (5th Cir. 1921). Thus, in *Brown* the court stated:

> "Also without merit is the county's contention that it is not a 'citizen' of Kentucky for purposes of diversity of citizenship under 28 U.S.C. § 1332. In Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 19 L.Ed. 86, the Supreme Court held that for purposes of diversity jurisdiction a county is a citizen of the State in which it is located." 394 F.2d at 500.

The only challenge to this long line of federal authorities are the opinions of the court below in this case and in *Miller v. County of Los Angeles*, 341 F.2d

964 (9th Cir. 1965). While the court below predicates these decisions on the mere labeling of the County as a "state agency," an examination of the County's true character shows such labeling to be fallacious. Moreover, district courts in other states within the Ninth Circuit have questioned the view of the court below with respect to California counties and have refused to follow it for their states' counties.

Thus, in *White v. Umatilla County*, 247 F.Supp. 918, 920 (D. Ore. 1965) the court stated:

> "The only challenges to this formidable line of authority are the rather recent Ninth Circuit cases of Miller v. County of Los Angeles, 341 F.2d 964 (9th Cir. 1965) and Lowe v. Manhattan Beach City School District, 222 F.2d 258 (9th Cir. 1955). Since Miller is based entirely on Lowe, we must turn to the latter for the basis of these decisions. There, the District Court held:
>
> '(1) That the record in this cause does not disclose complete diversity of citizenship between the parties (28 U.S.C. § 1332 * * *).' Without analysis, or discussion, the Court of Appeals said:
>
> 'We agree with this conclusion upon the ground that the state is not a citizen and that the school district is a part of the government of the state. * * *'

In support, the court cites such cases as State Highway Comm'n. of Wyoming v. Utah Constr. Co. 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929); Fowler v. California Toll-Bridge Auth.,

128 F.2d 549 (9th Cir. 1942), involving the same principles as those stated in DeLong, supra. Although I have serious doubts on the subject, it is possible that school districts in California are viewed as true state agencies with full and complete power and authority in the state over the districts. In any event, the authorities cited in support of the decision do not seem to be appropriate.

"In Miller v. County of Los Angeles, supra, our Court of Appeals, without an analysis of the statutory standing, position or powers of the county in question, and relying entirely on Lowe, made the following statement:

> 'On the authority of Lowe, we hold that the allegations of the complaint are not sufficient to invoke the diversity jurisdiction of the District Court under 28 U.S.C. § 1332.'"

"Fortifying the thought that the subject was not adequately briefed to, nor thoroughly analyzed by, the Court of Appeals in either Lowe or Miller, is the fact that no mention is made of federal cases holding to the contrary. Furthermore, the issue before the court in Lowe and Miller was decided in favor of jurisdiction under 28 U.S.C. § 1331. What the court said in each of those cases on §1332, the diversity statute, was completely unnecessary to the decision." (Emphasis added.)

In *Universal Sur. Co. v. Lescher and Mahoney, Arch. & Eng.*, 340 F. Supp. 303 (D. Ariz. 1972) the court also noted the *Lowe* and *Miller* decisions, but then went on to hold, in accordance with the over-

whelming weight of federal authority, that Arizona counties were citizens for diversity jurisdiction purposes. Exemplifying the factors used to reach its decision are the following observations of the court:

"The defendant in the instant case in arguing that an Arizona county is not a separate entity because it is an arm of the state government, relies on some general descriptive statements in Arizona case law to the effect that a county is created by the state for the purpose of government, and a county has only such powers that the state legislature gives it. Defendant concludes from these general descriptions that an Arizona county is not a separate entity but is in fact the 'state' for Eleventh Amendment protection.

"The defendant's analysis completely fails to deal with Arizona legislative intention as revealed by its constitution and statutory provisions which provide that an Arizona county has a separate corporate identity with detailed powers, including the power to sue and to be sued in its own corporate name.

". . .

"Thus, an Arizona county corporation, like any other public or private corporation, is limited to those powers specifically granted it by the state. However, the powers which the State of Arizona has in fact granted its counties clearly envision an autonomous, separate entity, both in a general sense and specifically in relation to those matters which are concerned in this action.

". . .

"To appreciate the decided difference, one need only to compare the power of an Arizona county

to act in its own corporate name for many purposes, including suit, contracts, and taxes; A.R.S §§ 11-201 and 11-202; to build county buildings, A.R.S. § 11-271; to issue bonds, A.R.S. § 11-272; and through its board of supervisors, to exercise '. . . the sole and exclusive authority to provide for the hospitalization and medical care of the indigent sick in the county . . .' A.R.S. § 11-291, as well as all of the broad powers delineated in A.R.S. § 11-251. The county's powers in Arizona even extend to the power to create other municipal corporations, thus the county board of supervisors may declare an '. . . improvement district organized under a corporate name . . .' and 'Thereafter the district shall be a body corporate with the powers of a municipal corporation', A.R.S. § 11-706. Such a corporation created by a county has the power of condemnation. A.R.S. § 11-709, subsec. B, par. 1." *Id.* at 304-305.

In the instant case the County of Alameda has, likewise, sought to rely on a general descriptive statement in California law that counties are "legal subdivisions of the State" (Cal. Const., Art. II, §1) for the proposition that it is not a separate entity from the state. Yet, just as such contention failed in *Universal Sur. Co.*, so too must it fail herein when an analysis of the County's true character is made.

The powers, duties and functions of a county in California are set out in the California Constitution and in a number of provisions of the California codes. Some of the more salient features are as follows (references

are to the California Government Code unless otherwise noted):

— It has "corporate" powers and is a body "corporate and politic," §§23000 and 23003.

— It may sue and be sued, §§945 and 23004(a), and is deemed a "local public entity" for this purpose, §940.4 (in contradistinction to the state and state agencies, §940.6).

— It is deemed and treated as a "local agency" for the purpose of venue in civil actions, Code of Civil Procedure §394(3) (in contradistinction to venue provided for actions against the state and state agencies, Code of Civil Procedure §401).

— It may settle and pay claims and establish claims procedures, §§905, 912.6, 930.2, 935 and 29700-29710, and is deemed a "local public entity" for this purpose, §900.4 (in contradistinction to the state and state agencies, §900.6).

— It is liable for judgments against it, and must levy taxes necessary to pay them, §50171.

— It may receive, manage, hold, sell or otherwise dispose of property, §§23004(b), (d) and 25520-25539.

— It may contract, construct buildings, improvements, and make repairs thereon, §§23004(c) and 25450-25467.

— It may engage in all varieties of utility services and public activities such as acquiring or operating water works, water rights, flood control, water reclamation, rubbish disposal, harbor facilities, airport facilities and libraries, §§25690-26224.

— It must adopt an annual budget and its expenditures are limited to its budget, §§29000-29093 and 29120.

— It may levy and collect taxes, §§23004(e), 25202; and the amount levied must be enough to meet its budget, §§29007, 29012.5 and 29100.

— It may issue general obligation bonds by vote of the electorate of the county, §§29900-29929; and these are obligations to be paid from county taxes, §§29922-29924; and are not obligations of the state (except that a state agency may itself impose and collect the necessary taxes within the county to pay the bond holders if the county fails to do so, §§29925-29927).

— Its boundaries may be altered, or a new county created, or a county seat moved, by proceedings taken within the county or counties concerned, by petition or election, as the case may be, §§ 23200-23690.

— Its government, including its elected governing body, is provided for in its county charter. Cal. Const. Art. 11, §4.

— It may have its charter amended, or a new charter enacted by vote of the electorate of the county (with state legislature ratification, in the case of a new charter) §§23700-23724.

— It may make and enforce ordinances and regulations not in conflict with general laws. Cal.Const. Art. 11, §7.

— It has full legislative powers on all subjects granted by its charter, exercisable through its elected Board of Supervisors; and it may codify its ordinances, §§25207 and 50020-50022.10.

— It elects or appoints, and it pays the salaries of, its governing body and all its officers and employees, §§24200-24204, 25000 and 28000.

It is, thus, obvious that a California county is not part of the government of and is not a department, agency, commission or other instrumentality of the State of California. The State of California has no power to direct or control the affairs or management of a county, or its governing body, officers or employees. The State has no interest in any of the property, funds or assets of a county and has no liability for a county's obligations or liabilities (including the liabilities sought to be asserted by plaintiffs herein).

Further recognizing the separate entity status of a California county is the following statement by the California Supreme Court in *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 491 n. 12 [96 Cal.Rptr. 553, 487 P.2d 1193] (1971) wherein the court discussed whether a writ of mandate could be issued against a county:

> "Code of Civil Procedure section 1085 states that the writ may be issued to any 'inferior tribunal, corporation, board or person.' While it has been said that counties are not municipal corporations but are political subdivisions of the state for purposes of government (*County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638-639 [2 Cal. Rptr. 758, 349 P.2d 526]; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 627-628 [59 P.2d 139, 106 A.L.R. 903]; *County of San Mateo v. Coburn* (1900) 130 Cal. 631, 636-637 [63 P. 78,

621]; *Pitchess v. Superior Court* (1969) 2 Cal. App.3d 653, 656-657 [83 Cal.Rptr. 41]), counties have also been declared public corporations or quasi-corporations. (*Pitchess v. Superior Court, supra; Whelan v. Bailey* (1934) 1 Cal.App.2d 334, 339 [36 P.2d 709], overruled on other grounds in *Estate of Miller* (1936) 5 Cal.2d 588, 591 [55 P.2d 491]; *Smith v. Myers* (1860) 15 Cal. 33, 34; 1 McQuillin, Municipal Corporations (3d ed.) §2.46, pp. 496-497.) In view of Government Code section 23003, which provides that a county is 'a body corporate and public,' and section 23004, subdivision (a) of the same code, which states that counties may sue and be sued, we think that a county is sufficently corporate in character to justify the issuance of a writ of mandate to it."

Yet, in spite of this separate corporate character enjoyed by the County of Alameda, the court below simply ignored both California law and the federal authorities cited above and, instead, relied entirely upon its earlier decisions in *Lowe* and *Miller*. Because of this reliance plaintiffs offer the following analysis of *Lowe* and *Miller* as a possible explanation of how they came about and to show that they are not based upon any unique characteristics of California counties.

Both *Lowe* and *Miller* were brought by *pro. per.* plaintiffs. The order dismissing the action in *Lowe* was made by the late District Judge, William C. Mathes, who was known and reputed to be particularly expert on matters of federal jurisdiction. Yet, Judge Mathes, in his own prior decision, *Merced Dredging Co. v. Merced County*, 67 F.Supp. 598, 604 (S.D. Cal. 1946),

specifically upheld diversity of citizenship jurisdiction in a case against the County of Merced, stating:

> "Since plaintiff is a Nevada corporation and defendant County of Merced is a 'citizen' of California within the meaning of Article III, §2, (U.S. Const.) requisite diversity of citizenship exists. Cowles v. Mercer County, 1868, 74 US 118, 122, 7 Wall. 118, 19 L.Ed. 86; Pettibone v. Cook County, 8 Cir., 1941, 120 F.2d 850, 851."

A careful reading of Judge Mathes' order in *Lowe* (Exhibit "A" attached hereto),[7] in the light of his prior *Merced County* opinion and the other authorities so comprehensively cited in his order suggest that his decision in *Lowe* was, perhaps, based on an inadequacy of pleading concept.

Further exemplifying the fact that *Lowe* was, at most, a unique pleading requirements case, is the fact that in *Miller* the court below specifically stated:

> "On the authority of Lowe, we hold that the allegations of the complaint are not sufficient to invoke the diversity jurisdiction of the District Court under 28 U.S.C. §1332." 341 F.2d at 966.

Unfortunately, this pleading requirement analysis seems to have been lost somewhere along the way, with the result being that the court below now cites *Lowe* and *Miller* as a basis for an alleged "rule" of jurisdiction. It might also be noted that the diversity jurisdiction statements made in both *Lowe* and *Miller* were unnecessary since the court below found federal jurisdiction to exist in each of those cases.

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[7] A certified copy of the opinion will be available at the hearing for the Court's use.

Given, therefore, this origin of the decision by the court below on the status of California counties, and coupling it with the long standing rule of the court below that no three-judge panel can overrule another such panel on a similar though not identical issue (see footnote 6, *supra*), it becomes less difficult to understand how the court below reached its decision herein. Yet, no matter how reached, the decision is incorrect.

In view of the distinct "corporate" status of the County of Alameda, as noted above, logic compels the conclusion that it must be considered a citizen separate from the state for diversity jurisdiction purposes. Indeed, California law fully recognized this distinction between the state as an entity and a county as an entity when it enacted §23011 of the Government Code:

> "The name of a county designated in this chapter is its corporate name, and it shall be designated thereby in any action or proceeding touching its corporate rights, property, and duties."

In view of the above, as well as the overwhelming body of federal law that holds counties to be citizens of their states for diversity jurisdiction purposes, there can be no justification for continuing the fiction that a California county is, in reality, the State. California counties are considered to be separate viable entities having numerous rights and duties like any other person or corporation, and under recent California case authority are even deemed to be "corporate in char-

acter." They should, therefore, be deemed to be "citizens" for diversity jurisdiction purposes.

In sum, plaintiff submits the following statements from *Universal Sur. Co.* as policy considerations by which to be guided:

> "Further, there is no policy reason or comity consideration in broadening the reading of the term 'state' in the Eleventh Amendment in relation to an Arizona county since such a reading would only close a federal forum to a suit which is not barred in the state's own courts in order to provide protection for a form of sovereign immunity which the state by its constitution, statutes, and rules has specifically relinquished.
>
> "Since the State of Arizona has limited its immunity by means of setting up autonomous county corporations amenable to suit, and further, Arizona has generally been a leader in the modern trend to limit its immunity, having abolished sovereign immunity in tort actions, it would be most inappropriate for a federal forum to reverse the trend, albeit indirectly, by enlarging the state's immunity to extend it to a suit against a corporate political body." 340 F. Supp. at 306.

Plaintiff would also suggest that since this issue affects all types of cases which may be brought against a California county, and because the present decision by the court below is so obviously wrong, that even if plaintiffs prevail on their other jurisdictional issues, that the Court also reverse the opinion of the court below on this issue and thus make diversity jurisdiction for political subdivisions uniform among all the circuits.

Conclusion.

For the reasons stated above it is respectfully submitted that the judgment of the court below should be reversed.

Dated: November 22, 1972.

Respectfully submitted,

RONALD M. GREENBERG,
Counsel for Petitioners.

EXHIBIT A.

Order Dismissing Action for Want of Jurisdiction Over the Subject Matter.

United States District Court, for the Southern District of California, Central Division.

Grace Lowe, Plaintiff, v. Manhattan City Beach School, District of Los Angeles County, a political division of the State of California, John L. Miles, John Doe, Richard Doe, and Thomas Doe, Defendants. No. 16646-WM Civil.

Filed: April 14, 1954.

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U.S.C. §1332; *Indianapolis v. Chase National Bank,* 314 U.S. 63, 69-70, 76-77 (1941); *Highway Commission v. Utah Co.,* 278 U.S. 194, 200 (1929); *Broadwater etc. Ass'n. v. Montana Power Co.,* 139 F.2d 998, 999 (9th Cir. 1944); *Fowler v. Calif. Toll-Bridge Authority,* 128 F.2d 549 (9th Cir. 1942)];

(2) that there is no claim or cause of action asserted in the complaint which "arises under the Constitution, laws or treaties of the United States" [28 U.S.C. § 1331; *Gully v. First National Bank,* 299 U.S. 109, 112-114 (1936); *Puerto Rico v. Russell & Co.,* 288 U.S. 476, 483-484 (1933); *Hooe v. United States,* 218 U.S. 322, 335-336 (1910); *Scribner v. Straus,* 210 U.S. 352 (1908); *Wade v. Lawder,* 165 U.S. 624 (1897); *Dale Tile Mfg. Co. v. Hyatt,* 125 U.S. 46 (1888); *Republic Pictures Corp. v. Security etc. Bank,* 197 F.2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8 (a)(1), 28 U.S.C.A. 252 (1950)] do not affirmatively appear [*Robertson v. Cease*, 97 U.S. 646, 648-650 (1878); *Ex Parte Smith*, 94 U.S. 455, 456 (1876)], this court of limited jurisdiction [*Shamrock Oil Co. v. Sheets*, 313 U.S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [*Bors v. Preston*, 111 U.S. 252, 255 (1884); *Grace v. American Central Ins. Co.*, 109 U.S. 278 (1883); *Turner v. Bank of North America*, 4 Dall. (4 U.S.) 7, 11 (1800); *New York Life Ins. Co. v. Kaufman*, 78 F.2d 398, 400 (9th Cir. 1935)];

IT IS ORDERED upon the Court's own initiative [Fed. Rules Civ. Proc., Rule 12(h), 28 U.S.C.A. at 336] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A. at 335].

IT IS FURTHER ORDERED that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U.S.C.A. at 380].

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail upon the matter for the parties appearing in this cause.

April 14, 1954.

/s/ Wm. C. Mathes
Wm. C. Mathes
United States District Judge